

DENTAL BOARD OF CALIFORNIA

JOINT LEGISLATIVE SUNSET REVIEW COMMITTEE 2003 SUNSET REVIEW REPORT

Background Paper for the 2002 Public Hearing and Final Recommendations of the Joint Committee

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1.

BACKGROUND PAPER FOR 2002 PUBLIC HEARING

PREVIOUS SUNSET REVIEW, FINDINGS AND RECOMMENDATIONS OF THE ENFORCEMENT MONITOR, BOARD ACTIONS SINCE LAST REVIEW AND CURRENT REVIEW

GENERAL BACKGROUND AND DESCRIPTION OF THE DENTAL BOARD

The Dental Board of California (Board) was created by the California Legislature in 1885 and was originally established to regulate dentists. Today, the Board regulates the practice of approximately 74,000 dental health professionals including about 30,000 dentists and over 44,000 licensed dental auxiliaries including Registered Dental Assistants (RDA), Registered Dental Hygienists (RDH), Registered Dental Assistants in Extended Functions (RDAEF), Registered Dental Hygienists in Extended Functions (RDHEF), and Registered Dental Hygienists in Alternative Practice (RDHAP). There are also an undetermined number of unlicensed dental assistants who also work in dental offices under the supervision of a licensed dentist.

The Committee on Dental Auxiliaries was statutorily created in 1974 within the jurisdiction of the Board and was established to provide advice on the functions of and work settings of dental auxiliaries. Since 1998, COMDA has statutory authority to administer dental auxiliary license examinations, issue and renew dental auxiliary licenses, evaluate auxiliary educational programs, and recommend regulatory changes regarding dental auxiliaries. The Board has the authority regarding all aspects of the licensing of dentists, all enforcement and investigation authority regarding all dental office personnel including dentists, licensed and unlicensed dental auxiliaries, and the approval of educational programs that provide the prerequisite education to become a licensed dentist or dental auxiliary.

The Board is composed of fourteen members – 8 licensed dentists, 2 dental auxiliaries (1 RDH and 1 RDA), and 4 public members. Two of the public members are appointed by the Legislature (one by each house) and the Governor appoints the remaining 12 members. The Board's mission is protect the consumers of this state through the examination and licensing of dental professionals and by the enforcement of laws and standards of practice that govern dentistry in California. The Board is entirely self-funded, primarily from application, examination, and license fees that it collects.

PRIOR SUNSET REVIEW

The Joint Legislative Sunset Review Committee (JLSRC) last reviewed the Board two years ago (2000-2001). The JLSRC and the Department of Consumer Affairs (DCA) identified a number of issues and problem areas concerning this Board. There had been longstanding dissatisfaction with the deliberations and actions of the Board by the various organizations representing dental auxiliaries and others for a variety of reasons. The complaints and concerns expressed were virtually the same as when the Board was reviewed by the JLSRC in 1996. Some of these concerns or problems have been noted in audits by the California State Auditor and by an independent review of the Board's investigative program and the need for sworn peace officers. The Board was criticized for being controlled by its dentist majority and favorable to their interests over those of the public and the licensed dental auxiliaries. It was accused of being unduly absorbed with minutiae – extensive deliberations on whether or not particular duties or functions may be performed by one or more of the categories of dental auxiliaries – the so-called “duty of the month” debate over the scopes of practice of dental auxiliaries.

Some specific problems cited with this Board included:

- Recalcitrance and excessive delay in adopting the regulations that are necessary to implement enacted legislation – particularly when related to dental auxiliaries - such as that which created the Registered Dental Hygienist in Alternative Practice (RDHAP).
- Ignoring the intent of the Legislature in enacting legislation - again such as the RDHAP.
- Delay and apparent ambivalence, at least initially, with the concerns of the Legislature and other regarding the illegal practice of medicine by licensed dentists through the advertising and performance of elective cosmetic surgery.
- Excessive delay in the Board's enforcement (disciplinary) actions – and the inability to identify the causes therefore, and develop and implement a plan to reduce the long periods of time involved at each stage of the disciplinary process.
- Apparent bias against dental auxiliaries, and in particular – dental hygienists – by delay or failure to authorize them to practice procedures that are within their competence through their education and training.
- Excessive delay in revising and releasing the Dental Materials Fact Sheet mandated by legislation – which would inform dental patients that dental amalgam contains mercury – and the current status of scientific findings regarding its use.
- Apparent failure of the Board, despite some recent efforts to improve its case management system, to recognize the need to implement a more detailed time management system for its investigative activities so that a proper assessment can be made of the productivity, workload, and need for having additional permanent sworn peace officers as its investigators.

Ultimately, the JLSRC recommended that the Board be reconstituted as of January 1, 2002. Other recommendations included: (1) the appointment of a Dental Board Enforcement Program Monitor; (2) the scope of practice of dental auxiliaries should be moved from regulations to statute; (3) the next occupational analysis of dentistry should include a survey of the practices of oral and maxillofacial licensees; (4) the current lack of availability of RDHAP educational programs should be reviewed; (5) dentists should discuss the different types of restorative filling materials with their patients and provide the Dental Materials Fact Sheet prior to the performance of any dental restoration that could involve the use of amalgam; (6) a system be established for easy determination of appropriate scope and standards for dental auxiliaries which allows them to adopt and utilize new equipment and emerging technologies as they arise; (7) educational requirements should be implemented for infection control and CPR as well as dental jurisprudence for RDAs and RDHs; and (8) the Board should consider supporting licensure-by-credential legislation.

The recommendation to reconstitute the Board was implemented through SB 134 (Figueroa), Chapter 532, Statutes of 2001. The Enforcement Monitor recommendation was implemented through SB 26 (Figueroa), Chapter 615, Statutes of 2001.

THE DENTAL BOARD ENFORCEMENT MONITOR

THE MONITOR AND THE SCOPE OF THE PROJECT:

The Director of DCA appointed Benjamin Frank of New Point Group as the Dental Board Enforcement Program Monitor (Monitor). The Monitor will conduct a four-phase, two-year project. The Monitor is charged with monitoring and evaluating the Dental Board discipline system and procedures with specific concentration of the improvement of the overall efficiency of the Board's disciplinary system. This monitoring duty includes improving the quality and consistency of complaint processing and investigation and reducing the timeframes for each, reducing any complaint backlog, and assuring consistency in the application of sanctions or discipline imposed on licensees. The Monitor's duties also include the accurate and consistent implementation of the laws and rules affecting discipline, staff concerns regarding disciplinary matters or procedures, appropriate utilization of licensed professionals to investigate complaints, and the Board's cooperation with other governmental entities charged with enforcing related laws and regulations regarding dentists.

THE INITIAL REPORT OF THE MONITOR:

For his initial report, the Monitor conducted an overall assessment of the Board's enforcement program which included reviewing and identifying issues relating to the program's organization, management, and staffing; complaint workload and processing times; operational performance; financial management; and other potential issues. See the Initial Report of the Monitor (attached).

As required by statute, the Monitor submitted an initial written report of his findings and conclusions to the Board, DCA, and the Legislature by September 1, 2002. The Monitor found numerous deficiencies in the enforcement program and made nearly 40 recommendations for improvement of the Board's enforcement program. Some of these include:

- Request exemptions from the hiring freeze for vacant investigator positions and convert current limited-term peace officers to a permanent status;
- Repeal current statutes related to limited-term peace officer appointments and forego any further analysis of: a) the potential use of non-sworn investigators to replace some of the Board's peace officers and b) contracting for peace officer services;
- Realignment of staff reporting relationships and development of staffing analysis;
- Update and customize statistical reporting system as well as activating additional reports;
- Strengthen oversight and control of fiscal management information systems;
- Develop policy and procedures manuals to address widespread inconsistencies;
- Aggressively monitor all cases that have been sent to the Attorney General's Office and maintain summary-level aging data;
- Implement an automated investigative time reporting system;
- Develop contingency plan to address current imbalances between staffing and workload;
- Disseminate customer satisfaction surveys to complainants on a continuous basis in conjunction with the issuance of case closing letters;
- Establish realistic case aging objectives;
- Develop a new case prioritization system;
- Expand outreach, education, and proactive enforcement programs, subject to the availability of staffing and funding resources;
- Analyze disclosure policy; and
- Analyze compensation rates for subject matter experts.

On November 13, 2002, the Monitor issued a follow-up to his initial report (attached). As noted within that report, current fiscal year-to-date statistical information suggests that there has been a dramatic improvement in the enforcement program performance during the past several months. The Monitor has also outlined what recommendations have been: a) fully implemented, b) partially implemented, or c) not yet implemented.

BOARD ACTIONS IN RESPONSE TO MONITOR'S RECOMMENDATIONS

Since the Monitor's initial report was issued, the Board has taken many steps to implement, and to strategically plan for implementation of, the recommendations. In a letter to the JLSRC in August 2002, the Board outlined progress in addressing the recommendations of the Monitor. Changes occurring in complaint processing, the investigations unit, the probation unit, the inspection program, and other areas were reported as follows:

- Case reviews have been completed and will continue on a monthly basis with complaint processing staff; case reviews are also now being held with investigators.
- To avoid a backlog of complaints, a program to use outside consultants, on a limited basis, to review pending cases has been established;
- All investigations over one year old have been given highest priority for completion; and
- A number of manuals are being developed or updated to reflect policies and procedures.

Further, on November 13, 2002, the Board submitted a written response to each of the recommendations of the Monitor to the JLSRC. This document is provided in the Members' binders.

Many of the recommendations have been successfully implemented, while others are in progress and will continue as projects through 2003. The following list reflects some of the changes that have been made, or are in the process of being made, pursuant to the recommendations:

- Development of an Enforcement Program Improvement Plan;
- Development of a contingency plan to address imbalances between investigative workload demands and current staffing resource capabilities;
- Reduction in case aging for open complaints and cases in formal investigation;
- Guidelines for timely complaint processing has been instituted;
- Automated tracking of investigative case activity;
- Implementation of improved tracking of disciplinary cases and associated costs – working more closely with the Attorney General's Office.
- Designation of an individual in each region to oversee and supervise probation monitoring activities;

- Discontinuation the special processing and malpractice cases;
- Improvement in complaint statistical information; and
- Improvement in investigator timekeeping applications.

The Board will also make a number of other enforcement program improvements for the coming year, including: 1) revise the current Disciplinary Guidelines; 2) seek legislation to enhance enforcement options relative to monetary reimbursements; 3) staff training; 4) analysis and development of public disclosure policy; 5) conduct training sessions for expert witnesses and disseminate newly developed guidebook; 6) implement consumer satisfaction survey; 7) improve quality of case closure letters to consumers; 8) complete performance analysis for enforcement staff; and 9) revise current complaint priorities.

The Board and its staff have worked closely with the Monitor and there has been significant progress in the enforcement program. The Board has set specific goals, objectives, and target dates for implementation of the Monitor's recommendations. However, the hiring freeze and recent position cuts, coupled with budgetary constraints, have hampered the Board's ability to move more expeditiously in decreasing case aging of complaints and investigations. Taking this into account, a few of the recommendations have been deferred in consultation with the Monitor.

CONTINUED ROLE OF THE MONITOR

The term of the Enforcement Monitor will continue through January 2004. The initial report includes many recommendations, but the Monitor will continue to review the Board's enforcement program and provide both additional recommendations as well as refinements of the present recommendations.

ISSUES CURRENTLY FACING THE BOARD

Although there has been much improvement in the Board's enforcement program, deficiencies in other Board programs have a direct impact the enforcement program. The following are other areas of concern that have arisen:

- 1) Critical Need for Management and Staff Resources – Filling the executive officer position as quickly as possible is essential. The Monitor notes that there is a risk that the progress that has been made ill be reversed in the absence of sufficient management, investigative and support resources.
- 2) Examination Program – Concerns have been raised that the Board is unable to administer an adequate amount of examinations. Further, the examination schedule for FY 2003/04 reflects a significant reduction in examinations.

- 3) Getting a Handle on the Budget – A better expenditure planning and monitoring process needs to be put in place. Improvement needs to be made on how the Board oversees and manages its budget and expenditures.
- 4) Hiring Freeze and Exemption Requests – The Board has not submitted requests for exemption to the hiring freeze for all of its vacant positions. Without submission of exemption requests, approval to fill positions (which the Board to fill positions that are critical to the forward movement and rebuilding) is not possible.
- 5) Submission of Budget Change Proposals (BCP) – As noted by the Monitor, the Board did not submit one BCP for FY 2003/04 to obtain additional funding for implementation of the Monitor's recommendations.
- 6) Consumer Satisfaction Survey – The Board should send a consumer satisfaction survey with every case-closing letter. The Monitor recommended in his initial report that this practice should begin immediately and the Board has not done so to date.
- 7) Disclosure Policy – Even though DCA has issued its guidelines for disclosure and other boards have revised their disclosure policies, this Board has not.
- 8) Working with DCA – It is important for the Board to work more effectively with the Department of Consumer Affairs – especially during this time when the Board does not have a permanent executive officer in place. At a minimum, the Board can look to DCA for assistance in budgetary planning, hiring of an executive officer, and the expedition of the current and future exemption requests.

CONCLUSION

As outlined by the Monitor, the groundwork has been laid for improvement of the enforcement program; a path for sustained progress has been mapped; substantial change has occurred, is occurring, and will continue to do so with the continued support of the Legislature, DCA, and the Administration.

2.

FINAL RECOMMENDATIONS OF THE JOINT COMMITTEE

The Following Recommendations were Adopted by the Joint Legislative Sunset Review Committee on April 7, 2003 by a Vote of 6 to 0:

The Dental Board Enforcement Monitor (Monitor) has made numerous recommendations relative to the Dental Board's Enforcement Program. Some of the recommendations have been fully implemented, some have been partially implemented, and some have been deferred. The Board should continue to implement all recommendations set forth by the Monitor, including submitting BCPs to obtain additional funding for implementation of the recommendations, updating the Board's complaint disclosure policy, revising policy and procedure manuals, analyzing staffing requirements, monitoring the status of legal action cases and Attorney General Office expenditures, and working effectively with the Department of Consumer Affairs.

ISSUE #1. (CONTINUE REGULATION OF THE PROFESSION BY THE BOARD?)
Should the licensing and regulation of the practice of dentistry be continued?

Recommendation #1: *The Joint Committee recommends the continued regulation of the practice of dentistry and that a board structure be maintained.*

Comments: The practice of dentistry affects the health and safety of Californians and requires a high level of skill.

ISSUE #2. (CONVERT LIMITED-TERM PEACE OFFICER POSITIONS TO FULL-TERM POSITIONS?) Should the statutes governing the number of limited-term peace officer positions be repealed?

Recommendation #2: *The Joint Committee recommends the conversion of the limited-term peace officer positions to full-term positions.*

Comments: Through SB 826 (Greene), Chapter 704, Statutes of 1997, seven investigator positions with limited-term (LT) peace officer status were designated. Three investigator

positions have since been reclassified to non-sworn classifications. The limited-term peace officer status of some of the investigator positions in the Board's Tustin Office is said to be the primary cause of repeated turnover among personnel in the positions. As of July 1, 2002, two of the four LT positions were vacant, one for two months and the other for four months. One of the previous incumbents stayed only nine months, and the other 16 months. An earlier incumbent stayed only six months. Conversely, the four Tustin Office investigator positions with permanent peace officer status have all been staffed with senior investigator who have at least seven years experience each.

The Monitor believes that limited-term restriction is clearly hampering the ability of the Board to operate effectively. In order to provide the Board with adequate resources, the Monitor recommends that the limited-term restriction on peace officer appointments be repealed so that appointments to the affected positions can be made on a permanent basis.

ISSUE #3. (PEACE OFFICE STUDY BE DELETED?) Should the requirement that a study on the use of non-sworn investigators be repealed?

Recommendation #3: The Joint Committee recommends the repeal of the current requirement for performance of the \$75,000 follow-up study.

Comments: A follow-up to an earlier study completed by an outside consultant was initially planned to be performed during FY 2001/02, but was deferred. The Initial Report of the Enforcement Monitor contains an extensive discussion of the basis for recommending that there should not be any further analysis of the potential use of non-sworn investigators to replace some of the Dental Board's sworn investigators. Since the issue of the Board's use of sworn peace officers first arose during the mid- 1990s, the number of authorized sworn peace officer positions has been reduced from 17 to 12. Recently, the Board's Chief of Enforcement has, out of necessity, diverted a small number of complaints to some of the Enforcement Program's non-sworn inspectors that otherwise would have been assigned to one of Program's few remaining sworn investigators. As was indicated in the Monitor's Initial Report, this bifurcated approach to assigning cases is inherently cumbersome, provides only marginal benefits, and adversely impacts the optimal utilization of management time. Finally, the Monitor does not believe that the Board currently has available the types of data that are needed to properly conduct this type of study. It is for exactly this reason that the results of the earlier study of this issue were inconclusive, and that a follow-up study was mandated.

ISSUE #4. (DISSEMINATE CONSUMER SATISFACTION SURVEY?) Should a consumer satisfaction survey go out with every complaint closing letter?

Recommendation #4: The Joint Committee recommends that the Board send out a consumer satisfaction survey to complainants on a continuous basis in conjunction with the issuance of case closing letters and start doing so by June 2003. Also, periodic summaries of survey results should be provided to the JLSRC.

Comments: Basic measures of consumer satisfaction with the Board's Enforcement Program are critically needed.

ISSUE #5. (OTHER BOARD PROGRAMS TO BE EXAMINED?) Should the Enforcement Monitor study other programs of the Board?

Recommendation #5: *The Joint Committee recommends that the Enforcement Monitor examine other aspects of the Board including other programs such as the Licensing Program, the Examination Program, and the Board's budget expenditures.*

Comments: Given the fact that the Board's Enforcement Program is being directly impacted by their other programs, the JLSRC believes that the Monitor should look at the Board overall. For example, some of the funding included in the Dental Board's budget for Enforcement Program staffing, equipment, legal action processing, and other costs is being utilized to support the Board's Licensing and Examination Programs. The practice of utilizing Enforcement Program funding to support the Licensing and Examination Programs, if it continues, could have adverse impacts on Enforcement Program performance